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In the Supreme Court of the United States

OCTOBER TERM, 1978

GEORGE P. ECHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 577 F. 2d 308.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1978. A petition for rehearing was denied on September 21, 1978. The petition for a writ of certiorari was filed on October 23, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 18 U.S.C. 1462, which proscribes the importation of obscene materials and the interstate transportation of such materials by common carrier, violates the First

Amendment and the Due Process Clause of the Fifth Amendment because it does not provide in terms for an adversary hearing to determine whether materials seized under court-authorized search warrants are obscene.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner and International Theaters Unlimited, Inc., were convicted on two counts of knowingly transporting obscene films in interstate commerce by common carrier, in violation of 18 U.S.C. 1462 and 2. Petitioner was sentenced to concurrent terms of one year's imprisonment on each count and a fine of $10,000. The court of appeals affirmed (Pet. App. A).

On April 1, 1975, pursuant to court-authorized search warrants, agents of the Federal Bureau of Investigation seized one film from each of two theaters operated by petitioner (Tr. 55-58, 60). On June 5, 1975, petitioner was indicted on charges of transporting obscene material in interstate commerce by common carrier, in violation of 18 U.S.C. 1462. Petitioner moved to dismiss the indictment on the ground that two allegedly unauthorized persons were present in the grand jury room during the jury's deliberation. On November 25, 1975, the government obtained a superseding indictment naming as defendants both petitioner and International Theaters Unlimited, Inc. Petitioner moved to dismiss this second indictment on the ground that the projectionist who exhibited the films to the grand jury was not authorized to be present during grand jury deliberations (413 F. Supp. 12, 13; 542 F. 2d 948, 950).

The district court dismissed the indictment on the ground that the projectionist was not a "witness under examination" whose presence before the grand jury was authorized by Fed. R. Crim. P. 6(d). 413 F. Supp. 12. The court of appeals reversed and held that the projectionist

was a "witness under examination" within the meaning of the rule (542 F. 2d 948). This Court denied certiorari (431 U.S. 904). Thereafter, petitioner was convicted on two of the three counts in the superseding indictment.[1]

ARGUMENT

Petitioner contends that 18 U.S.C. 1462 is unconstitutional because it does not provide in terms for an adversary hearing on the question of obscenity before or after the seizure of allegedly obscene materials. More particularly, petitioner argues that in this case the delay between the seizure of the films on April 1, 1975 and the beginning of his trial on July 11, 1977, violated the First Amendment and denied him procedural due process under the Fifth Amendment. Petitioner's argument is based on a faulty premise.

This Court has held that there is no absolute right to an adversary hearing before trial in cases where allegedly obscene materials are seized pursuant to a search warrant for evidentiary purposes in a criminal proceeding. *Heller* v. *New York*, 413 U.S. 483 (1973). See also *United States* v. *Pryba*, 502 F. 2d 391 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975). In *Heller* the Court considered and rejected the need for an adversary hearing preceding the seizure of one copy of an allegedly obscene film for use as evidence in a criminal trial. The Court observed that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding" (413 U.S. at 492). The Court reasoned that the temporary and limited restraint imposed by the seizure of a single copy of a film for evidentiary purposes ordinarily will not restrict distribution or exhibition of the film and that the Fourth

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[1]The government dismissed the third count before trial.

Amendment warrant procedure adequately protects against "gross abuses" of the First Amendment interests involved. *Id.* at 493. The Court stated (*id.* at 492-493):

> If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned.

Here, as in *Heller*, the films were seized pursuant to court-authorized search warrants and "for evidentiary purposes only—not censorship purposes" (Pet. App. 3a).[2] Following the seizure, an adversary hearing to review the correctness of the seizure was available on a pretrial

[2]Petitioner's reliance on *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), is misplaced. There the Court was confronted with a permanent refusal to permit performance of the theatrical production "Hair" at a city-owned auditorium or a city-leased theater. The ban was imposed with no prior hearing whatever. In ruling that such a ban violates the First Amendment, the Court distinguished *Heller* and noted that in *Heller* there was not "any form of 'final restraint' in the sense of being enjoined from exhibition" as there was in *Southeastern*. 420 U.S. at 557 n.9. Petitioner's citation of *Roaden* v. *Kentucky*, 413 U.S. 496 (1973), is also inapposite. *Roaden*, decided the same day as *Heller*, involved a warrantless seizure of a film incident to the arrest of the manager of the drive-in theater at which the film was being exhibited. The Court held the seizure unconstitutional, because there had been no prior probable cause determination by a judicial officer and no showing that such a determination was difficult or impossible to obtain before the seizure. Here, by contrast, the seizure of the films was authorized by warrant.

motion to return seized property under Fed. R. Crim. P. 41(e) or a motion to quash under Fed. R. Crim. P. 12. See, *e.g.*, *United States* v. *Sherwin*, 539 F. 2d 1, 9 (9th Cir. 1976). Nonetheless, as petitioner himself concedes (Pet. 4), at no time did he file a motion seeking a judicial determination of the obscenity question before trial or asking the court to allow him to copy the seized films. Petitioner's failure to make such a motion places him in a position like that of the defendant in *Heller*. As the Court there concluded (413 U.S. at 490-491),

> the barrier to a prompt judicial determination of the obscenity issue in an adversary proceeding was not the State, but petitioner's decision to waive pretrial motions and reserve the obscenity issue for trial.

By failing to file pretrial motions, petitioner waived his right to an advance determination on the obscenity issue. *Heller* v. *New York*, *supra*, 413 U.S. at 490-491; *United States* v. *Glassman*, 562 F. 2d 954, 957 (5th Cir. 1977). The court of appeals correctly observed (Pet. App. 5a) that

> [a] prompt determination of the obscenity issue prior to trial was available to the appellant. The appellant waived his right to such a determination by failing to request it via standard motion practice. If, in fact, the seizure of this evidence had an indirect censorship effect, the blame for its continued duration must rest on the shoulders of the appellant.[3]

[3]In his petition for a writ of certiorari, petitioner fails to mention that he did file numerous pretrial motions that accounted in large measure for the delay of which he complains. Following his initial indictment on June 5, 1975, petitioner requested and received an extension of time to file pleadings until October 3, 1975. On October 2, 1975, petitioner moved to suppress all films seized on the ground that the seizures were unlawful. He also moved to dismiss the indictment on the ground that the two-month delay between the seizure of the films on April 1, 1975, and his indictment on June 5, 1975, constituted a prior restraint in violation of the First and Fifth Amendments. On October 31, 1975, the district court granted in part

Petitioner suggests (Pet. 5, 9-10) that the films seized were the only copies in his possession and that their replacement would have subjected him to additional prosecution, because replacement would have required an additional interstate transportation. Petitioner has made no showing, however, that the seizure of the films here precluded their continued exhibition. Had this been the case, petitioner could have informed the district court that no other copies of the films were in his possession. Under this Court's ruling in *Heller*, *supra*, 413 U.S. at 492-493, the district court would then have been required to permit

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the motion to suppress but denied the motion to dismiss. The court stated that "no interested party requested an adversary hearing to determine the obscenity issue" (Memorandum and Order, Oct. 31, 1975). Following the return of the superseding indictment on November 25, 1975, petitioner was arraigned on December 10, 1975. On December 24, 1975, petitioner filed a second motion to dismiss. He argued that the time lapse before his indictment violated his First and Fifth Amendment rights. He also alleged that unauthorized persons were present in the grand jury room. On December 30, 1975, the district court granted petitioner a two and one-half month continuance. On March 9, 1976, the district court dismissed the indictment on the ground that there was an unauthorized person in the grand jury room (413 F. Supp. 12). On November 22, 1976, the court of appeals reversed (542 F. 2d 948), and this Court denied certiorari on May 2, 1977 (431 U.S. 904). On June 30, 1977, petitioner filed a supplemental motion to suppress. The motion was denied, and petitioner was convicted on July 11, 1977. This record demonstrates that the delay entailed in consideration of petitioner's motions, together with the two and one-half month continuance granted at his request, account for a large portion of the delay to which he now objects. During this time, petitioner never requested an adversary hearing on the question of obscenity. In these circumstances petitioner should not be heard to complain of any First or Fifth Amendment violations regarding the denial of a prompt judicial determination on the obscenity issue. See, *e.g.*, *United States* v. *Sherwin*, *supra*, 539 F. 2d at 5 n.2, 9; *United States* v. *Glassman*, *supra*, 562 F. 2d at 957.

the seized films to be copied pending a judicial determination of the obscenity issue or in the alternative to order the films returned to petitioner. But petitioner neither sought an adversary hearing nor did he ask the court to allow him to copy the seized films.[4]

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[4]Petitioner contends (Pet. 7) that, under prevailing law in the Fifth Circuit, "a motion under [Rule] 41(e) [does] not lie for the return of seized films, seized under a warrant where no indictment ha[s] been returned." Petitioner argues that, as a consequence, he could not obtain the return of his films during the 65-day period between their seizure and his first indictment, even if he had sought relief in the district court. Petitioner relies primarily on *United States* v. *Glassman*; he refers to this case without citation in the text of his petition (Pet. 7), but in the index indicates that the case can be found at 560 F. 2d 320 (1977). This citation is incorrect and the only recent Fifth Circuit decisions with the same caption, 533 F. 2d 262 (1976) and 562 F. 2d 954 (1977), do not in any way support the proposition that courts will not grant relief on Rule 41(e) motions until after indictment. Indeed the first of these decisions, in discussing the appealability of rulings on preindictment motions under Rule 41(e), clearly implies that relief may be granted in response to such motions. Likewise, the other cases cited by petitioner, *Hunsucker* v. *Phinney*, 497 F. 2d 29 (5th Cir. 1974), cert. denied, 420 U.S. 927 (1975), and *Richey* v. *Smith*, 515 F. 2d 1239 (5th Cir. 1975), do not hold that Rule 41(e) motions before indictment are futile. See also *United States* v. *Chapman*, 559 F. 2d 402 (5th Cir. 1977). In short, during the first two months after the seizure of the films, as well as the 14½ months that followed before petitioner's conviction, he could have invoked the aid of the courts to obtain either the return of his property or an immediate determination on the obscenity issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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